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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536



File: WAC 99 167 50328

Office: California Service Center

Date:

AUG 07 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Other Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a private party who seeks to employ the beneficiary permanently in the United States as a child monitor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage since the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered beginning on the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date is May 24, 1999. The beneficiary's salary as stated on the labor certification is \$7.69 per hour which equals \$15,995.20 annually.

On July 25, 2000, the California Service Center issued a Request for Evidence. The petitioner was requested to submit evidence of the ability to pay the proffered wage during the preceding five

years.

In response, counsel submitted the petitioner's 1995, 1996, 1997, and 1998 tax returns, and the 1998 tax return of [REDACTED] the petitioner's wife. The petitioner's 1995 tax return shows that the petitioner received \$77,263 in taxable income. The 1996 return shows \$187,025 in taxable income. The 1997 return shows \$237,185 in taxable income. The petitioner's 1998 return shows \$33,344 in taxable income. The 1998 tax return of [REDACTED] shows \$130,627 in taxable income.

In addition, counsel submitted a 1999 Form W-2 wage and tax statement and a 1999 Form 1099 miscellaneous income statement, both showing payments to the petitioner during that year, and a 1999 Form W-2 wage and tax statement for [REDACTED] who is apparently also known as [REDACTED]. The petitioner's 1999 Form W-2 shows \$36,000 income and his 1999 Form 1099 shows \$321,000 income. [REDACTED] 1999 W-2 shows an income of \$165,431.98.

On March 13, 2001, the California Service Center issued another Request for Evidence in this matter. The petitioner was requested to provide evidence of the ability to pay the proffered beginning on September 13, 1989, and continuing until the date of that second request.

In response, the petitioner provided the petitioner's 1998 and 1999 income tax returns. The 1998 return shows a taxable income of \$33,344 and the 1999 income tax return shows a loss of \$1,212,707. Counsel also submitted the petitioner's 1989 through 1994 tax returns showing various annual incomes between \$100,000 and \$500,000.

On June 14, 2002, the Director, California Service Center, noted the loss the petitioner sustained during 1999. The director found that the petitioner had not demonstrated the continuing ability to pay the proffered wage. The director also noted that the petitioner had not submitted tax returns for 2000 and 2001 and denied the petition.

On appeal, counsel argues that the petitioner's loss was due to a depreciation deduction the petitioner received from his ownership of a portion of a limited partnership. Counsel did not provide the petitioner's 2000 or 2001 tax returns and did state any reason for failing to submit them.

Because the second Request for Evidence was issued during March of 2001, the petitioner's 2001 tax return was not then available. The petitioner's 2000 tax return may also have been unavailable on that

date. However, counsel's response is dated April 9, 2001 and postmarked April 16, 2001. The petitioner's 2001 tax return should have been available on that date. If it was not, an explanation for its absence was necessary.

The petitioner's 1999 tax return, as was stated above, shows a loss of \$1,212,707. Counsel states that the loss was due to a large depreciation deduction which was "for tax purpose only."

A depreciation deduction, while not a cash expenditure in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated in fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages.

Because the petitioner suffered a large loss, rather than accumulating income, during 1999, no evidence exists that the petitioner was able to pay the proffered wage out of his income. Neither counsel nor the petitioner submitted any evidence that the petitioner had any other source of funds, savings for instance, from which to pay the proffered wage during that year. As such, the petitioner has submitted no evidence of his ability to pay the proffered wage during 1999.

Further, neither the petitioner nor counsel has provided the petitioner's 2000 and 2001 tax returns, nor any other evidence of the petitioner's ability to pay the proffered wage during 2000 and 2001, although the California Service Center requested that evidence on March 13, 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999, 2000, and 2001. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.